



**Kenya National Union of Medical Laboratory Officers & another v Attorney General & 2 others; Kiiru & 4 others (Interested Parties) (Employment and Labour Relations Petition E239 of 2023) [2024] KEELRC 981 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 981 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E239 OF 2023**

**AN MWAURE, J**

**APRIL 12, 2024**

**BETWEEN**

**KENYA NATIONAL UNION OF MEDICAL LABORATORY OFFICERS ..... 1<sup>ST</sup> PETITIONER**

**ASSOCIATION OF KENYA MEDICAL LABORATORY SCIENTIFIC OFFICERS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE HONOURABLE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**DR. JOHN NDEMI KIIRU ..... INTERESTED PARTY**

**DR. LEONARD KINGW'ARA ..... INTERESTED PARTY**

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI) .... INTERESTED PARTY**

**NATIONAL AIDS AND STI CONTROL PROGRAMME (NASCOP) ..... INTERESTED PARTY**

**KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD ..... INTERESTED PARTY**



## RULING

1. The 1<sup>st</sup> Respondent filed a Notice of Motion dated 5<sup>th</sup> January 2024 seeking the following orders that: -
  - a. spent
  - b. spent
  - c. the court be pleased to admit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants/Respondents filed and served hard copy of the Replying Affidavit sworn on the 27<sup>th</sup> December 2023 by Robert Tonui and received by court on 4<sup>th</sup> January 2024 as properly on record.
  - d. each party bears its own costs

### **Respondents/Applicants' Case**

2. The Respondents aver that the Respondents' have realized that the Replying affidavit dated 27/12/2023 by Robert Tonui had a numbering error at page 2 and paragraph 16 and omitted that the Petition and Notice of Motion served upon them were not signed or commissioned. This was canvassed by parties during the oral hearing of the Application.
3. The Respondents aver that the affidavit was filed erroneously by the office clerk, Mr. Kiptoo Tarus; he received two affidavits via email by the Chief State Counsel, Oscar Eredi, when he made the mistake of filing one that was intended to be a draft.
4. The Respondents aver that they have filed and served a hard copy of the proper replying affidavit on 04/01/2024 which they wish to be admitted as properly on record.
5. The Respondents aver that delivering the ruling without their replying affidavit under reference would greatly prejudice them. The changes are minimal and they do not change the content and structure of the 2 replying affidavits will not be detrimental to the Petitioners/Respondents.

### **Petitioners/Applicants' Case**

6. In opposition to the Application, the Petitioners filed a replying affidavit dated 22<sup>nd</sup> January 2024.
7. The Petitioners aver that as ordered by the court, they served upon the parties the application and petition were duly served to the parties vide an email and WhatsApp as evidenced in the Affidavit of Service sworn on 28/12/2023.
8. The Petitioners aver that on the eve of the hearing, the 1<sup>st</sup> Respondent filed a replying affidavit dated 03/01/2024 and the matter proceeded for hearing on 04/01.2024 with the court directing the ruling.
9. The Petitioners aver that post hearing, the Respondents filed another replying affidavit dated 27/12/2023 in response to their Notice of Motion application dated 18/12/2023. The replying affidavit is substantively different in facts and law from what they had previously filed and served upon them on 03/01/2024.
10. The Petitioners aver that after the hearing on 04/01/2024, the Respondents neither requested for leave nor were they granted permission to file a supplementary affidavit nor substitute the one they had previously filed on 03/01/2024 and was relied on while making their arguments during the hearing.



11. The Petitioners aver that the impugned replying affidavit introduced new facts and issues of law not captured in their previous replying affidavit. In particular paragraph 19 which avers that the Application dated 18/12/2023 be declared incompetent and fatally defective as the supporting affidavit is not signed and commissioned and the annexures there are not attached.
12. The Petitioners avers that the Respondents allegation and introducing the same after the hearing had taken place are malicious and meant to prejudice them. The Petitioners protested the impugned replying affidavit vide email.

#### **Respondents/Applicants' Submissions**

13. The Respondents/Applicants submitted that the Application has been made in good faith and without any delay. It was filed the same day that parties were heard in court over the Petitioners/ Respondents' Notice of Motion application dated 18/12/2023.
14. The applicant was filed upon perusal of their replying affidavit sworn on 27/12/2023 and realization that it was not properly numbered at page 2 and that it had omitted the fact that the Petition and Notice of Motion filed upon the applicants were not commissioned, signed nor dated.
15. The Respondents/Applicant submitted that the application herein should be allowed as it bears merit. Further, the issue of numbering does not affect the substance of the replying affidavit and will not prejudice the Petitioners/Respondents.

#### **Petitioners/Respondents' Submissions**

16. It is the Petitioners' submission that the issues raised by the Respondents in the impugned replying affidavit were exhaustively dealt with by the parties on 04/01/2024 before the ruling was reserved. Therefore, there is no value the Respondents' application intends to add other than prolonging the matter at the Petitioners' detriment.
17. The Petitioners submitted that the numbering alone does not change the content of what was filed and submitted during the hearing on 04/01/2024. Hence, this is not reason for the Court to exercise its discretion and arrest the ruling.
18. It was submitted for the Petitioners that the Respondents are not being sincere as they confirmed during the hearing that they were served with a properly dated, signed and commissioned supporting affidavit and all annexures. Further, the Respondents did not attach the undated, unsigned and un-commissioned supporting affidavit they claim they were served. This shows the Respondents maliciousness and bad faith.

#### **Analysis and Determination**

19. Having considered the application, affidavits and submissions on record, the court is tasked to determine whether it should admit the Respondents/Applicants replying affidavit sworn on the 27/12/2023 and received by court on 04/01/2023 as properly on record.
20. The Respondents/Applicants argue that the replying affidavit seeks to remedy the previous replying affidavit which has a numbering error at page 2 and paragraph 16 omitted that the Petition and Notice of Motion served upon them were not signed or commissioned.
21. The Petitioners' supporting affidavit sworn on 18<sup>th</sup> December 2023 that was filed in court is duly dated, signed and commissioned.



22. In view of the foregoing, the Respondents/Applicants have only justified the numbering issue which the Petitioners/Respondents have no objection to its amendment, and indeed it would appear there was no need to file an application to amend pleadings because of numbering. There has been a delay of about 3 months because of that application which was not necessary.
23. Anyway the respondent's application is allowed and affidavit deponed by Mr Robert Tonui dated 27<sup>th</sup> December 2023 is deemed to be duly filed as a replying affidavit to the application of notice of motion of 18<sup>th</sup> December 2023. Also petitioner's supporting affidavit dated 18<sup>th</sup> December 2023 is found to be in order and is admitted by the court.
24. The court can proceed to give a ruling on the notice of motion unless the parties wish to file submissions.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

